

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MARTIN D. BORUM,)	
)	
Plaintiff,)	
)	
VS.)	No. 14-2718-JDT-tmp
)	
B. WILLIAMS, ET AL.,)	
)	
Defendants.)	

ORDER TO MODIFY THE DOCKET, DISMISSING COMPLAINT,
CERTIFYING THAT AN APPEAL WOULD NOT BE TAKEN IN GOOD FAITH
AND NOTIFYING PLAINTIFF OF APPELLATE FILING FEE

On September 15, 2014, Plaintiff, Martin D. Borum, Tennessee Department of Correction (“TDOC”) prisoner number 301803, who is currently incarcerated at the Northwest Correctional Complex in Tiptonville, Tennessee, filed a *pro se* complaint pursuant to 42 U.S.C. § 1983, accompanied by a motion seeking leave to proceed *in forma pauperis*. (ECF Nos. 1 & 2.)¹ In an order issued on September 17, 2014, the Court granted leave to proceed *in forma pauperis* and assessed the civil filing fee pursuant to the Prison Litigation Reform Act (“PLRA”), 28 U.S.C. §§ 1915(a)-(b). (ECF No. 4.) The Clerk shall record the

¹ The Clerk is directed to modify the docket to reflect Plaintiff’s current address and TDOC number, which were obtained from the TDOC Felony Offender Information, <https://apps.tn.gov/foil/>.

The complaint was also signed by Tempa Smith and Kimberly Smith, who are not identified but who are presumably relatives of Plaintiff. Because only Borum filed an *in forma pauperis* affidavit, the Clerk properly docketed the action with him as the only plaintiff.

Defendants as Memphis Police Officers B. Williams (# 11826), D. Hallum (# 12033) and B. Levi (# 12245) and Memphis Police Lieutenant KJ Jellin.

The factual allegations of the complaint are as follows:

On Friday June 6, 2014 I was charged with aggravated [sic] arson. By the above officers causing me to loose [sic] my job and family. I explained to the officers that my home was intenteally [sic] set on fire by someone, I was told by one of my neighbors passing by. They told me that they were gonna bring me in for questioning under 72 hour investigation. But they altered my statement, changed my words around and charged me with a terrible crime I didn't commit. They violated my civil rights, and I want to pursue damages. Me and my family are very angry and we want justice. I was drug by my cousin, and dropped off.

(ECF No. 1 at 2.) Plaintiff seeks money damages in the amount of \$250,000. He also wants the officers involved to be brought up on charges and to have his criminal case thrown out. (*Id.* at 3.)

By way of background, on June 6, 2014, Plaintiff was arrested on a charge of aggravated arson. *See* <http://jssi.shelbycountyttn.gov> (Booking # 14120599). On December 4, 2014, a grand jury returned an indictment charging Borum with aggravated arson. *See id.* (Indictment # 14 06196). The criminal case is pending.²

The Court is required to screen prisoner complaints and to dismiss any complaint, or any portion thereof, if the complaint—

² It appears that Borum had been on probation and that his probation was revoked after his arrest. On September 29, 2008, Borum pled guilty to a single count of manufacturing/delivering/selling cocaine and was sentenced to a term of imprisonment of eight years. *See id.* (Indictment # 08 03949). A petition to revoke a suspended sentence was granted on February 2, 2010. *Id.* On July 10, 2008, Borum pled guilty to burglary of a motor vehicle and was sentenced to two years. *See id.* (Indictment # W0800483).

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A(b); *see also* 28 U.S.C. § 1915(e)(2)(B).

In assessing whether the complaint in this case states a claim on which relief may be granted, the standards under Fed. R. Civ. P. 12(b)(6), as stated in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009), and in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007), are applied. *Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010). “Accepting all well-pleaded allegations in the complaint as true, the Court ‘consider[s] the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief.’” *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 681). “[P]leadings that . . . are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Iqbal*, 556 U.S. at 679; *see also Twombly*, 550 U.S. at 555 n.3 (“Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.”).

“A complaint can be frivolous either factually or legally.” *Hill*, 630 F.3d at 470 (citing *Neitzke v. Williams*, 490 U.S. 319, 325 (1989)). “Any complaint that is legally

frivolous would *ipso facto* fail to state a claim upon which relief can be granted.” *Id.* (citing *Neitzke*, 490 U.S. at 328-29).

Whether a complaint is factually frivolous under §§ 1915A(b)(1) and 1915(e)(2)(B)(i) is a separate issue from whether it fails to state a claim for relief. Statutes allowing a complaint to be dismissed as frivolous give judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint’s factual allegations and dismiss those claims whose factual contentions are clearly baseless. Unlike a dismissal for failure to state a claim, where a judge must accept all factual allegations as true, a judge does not have to accept “fantastic or delusional” factual allegations as true in prisoner complaints that are reviewed for frivolousness.

Id. at 471 (citations and internal quotation marks omitted).

“*Pro se* complaints are to be held ‘to less stringent standards than formal pleadings drafted by lawyers,’ and should therefore be liberally construed.” *Williams*, 631 F.3d at 383 (quoting *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004)). *Pro se* litigants, however, are not exempt from the requirements of the Federal Rules of Civil Procedure. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989); *see also Brown v. Matauszak*, 415 F. App’x 608, 612, 613 (6th Cir. Jan. 31, 2011) (affirming dismissal of *pro se* complaint for failure to comply with “unique pleading requirements” and stating “a court cannot ‘create a claim which [a plaintiff] has not spelled out in his pleading’” (quoting *Clark v. Nat’l Travelers Life Ins. Co.*, 518 F.2d 1167, 1169 (6th Cir. 1975))); *Payne v. Sec’y of Treas.*, 73 F. App’x 836, 837 (6th Cir. 2003) (affirming *sua sponte* dismissal of complaint pursuant to Fed. R. Civ. P. 8(a)(2) and stating, “[n]either this court nor the district court is required to create Payne’s claim for her”); *cf. Pliler v. Ford*, 542 U.S. 225, 231 (2004) (“District judges have no

obligation to act as counsel or paralegal to *pro se* litigants.”); *Young Bok Song v. Gipson*, 423 F. App’x 506, 510 (6th Cir. 2011) (“[W]e decline to affirmatively require courts to ferret out the strongest cause of action on behalf of *pro se* litigants. Not only would that duty be overly burdensome, it would transform the courts from neutral arbiters of disputes into advocates for a particular party. While courts are properly charged with protecting the rights of all who come before it, that responsibility does not encompass advising litigants as to what legal theories they should pursue.”).

To state a claim under 42 U.S.C. § 1983,³ a plaintiff must allege two elements: (1) a deprivation of rights secured by the “Constitution and laws” of the United States (2) committed by a defendant acting under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

A federal court cannot order a state court to dismiss a pending criminal case. Under the Anti-Injunction Act, 28 U.S.C. § 2283, “[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its

³ Section 1983 provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

judgments.” The Sixth Circuit has explained that “[t]he Act thereby creates an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions, which are set forth in the statutory language.” *Andreano v. City of Westlake*, 136 F. App’x 865, 879-80 (6th Cir. 2005) (internal quotation marks and citation omitted). Federal injunctions against state criminal proceedings can be issued only “under extraordinary circumstances where the danger of irreparable loss is both great and immediate.” *Younger v. Harris*, 401 U.S. 37, 45 (1971) (internal quotation marks and citation omitted). The Supreme Court has emphasized that

[c]ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered “irreparable” in the special legal sense of that term. Instead, the threat to the plaintiff’s federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

Id. at 46. Irreparable injury may be found only where the statute under which the Plaintiff is charged is “flagrantly and patently violative of express constitutional prohibitions, or where there is a showing of bad faith, harassment, or other unusual circumstances that would call for equitable relief.” *Mitchum v. Foster*, 407 U.S. 225, 231 (1972) (internal quotation marks, ellipses and citations omitted). No extraordinary circumstances are present in this case.

In addition, any claim for money damages arising from Plaintiff’s allegedly unlawful imprisonment is premature. As the Supreme Court has explained:

We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff

must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Heck v. Humphrey, 512 U.S. 477, 486-87 (1994) (footnotes omitted). Thus, a prisoner has no cause of action under § 1983 if the claims in that action hinge on factual proof that would call into question the validity of an order directing his confinement unless and until any prosecution is ended in his favor, an existing conviction is set aside or the confinement is declared illegal. *Id.* at 481-82; *Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995). None of these events has occurred in this case.

The complaint does not allege a viable claim for false arrest. A Fourth Amendment claim for false arrest requires an arrest without probable cause. *See, e.g., Parsons v. City of Pontiac*, 533 F.3d 492, 500 (6th Cir. 2008); *Crockett v. Cumberland Coll.*, 316 F.3d 571, 580 (6th Cir. 2003) (“Today it is well established that an arrest without probable cause violates the Fourth Amendment.”). Probable cause exists where a suspect is arrested pursuant to a

facially valid warrant⁴ or where “‘facts and circumstances within the officer’s knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing or is about to commit an offense.” *Crockett*, 316 F.3d at 580 (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)); *see also Wolfe v. Perry*, 412 F.3d 707, 717 (6th Cir. 2005) (“probable cause necessary to justify an arrest is defined as ‘whether at that moment [of the arrest] the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense’” (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)) (alterations in original)); *Gardenhire v. Schubert*, 205 F.3d 303, 315 (6th Cir. 2000). The vague and conclusory allegations of Plaintiff’s complaint do not set forth any facts indicating that, at the time Plaintiff was arrested, Defendants lacked probable cause to believe he had committed a crime. The complaint alleges only that Plaintiff told the officers that a neighbor had told him that someone else had committed the crime and that the police “altered [his] statement” and “changed [his] words” in some unspecified manner. The latter allegation may mean only that the police misconstrued Plaintiff’s statement and mistakenly concluded that he had been involved in the arson.

⁴ *Baker v. McCollan*, 443 U.S. 137, 142-46 (1979) (arrest and detention for three days under warrant issued in plaintiff’s name but meant for his brother did not state a Fourth Amendment claim); *see Masters v. Crouch*, 872 F.2d 1248, 1252-53 (6th Cir. 1989) (dismissing claim where warrant issued in error).

The complaint also does not allege a valid claim for malicious prosecution. The requirements for a malicious prosecution claim under § 1983 are as follows:

The Sixth Circuit “recognize[s] a separate constitutionally cognizable claim of malicious prosecution under the Fourth Amendment,” which “encompasses wrongful investigation, prosecution, conviction, and incarceration.” *Barnes v. Wright*, 449 F.3d 709, 715-16 (6th Cir. 2006) (internal quotation marks omitted). The “tort of malicious prosecution” is “entirely distinct” from that of false arrest, as the malicious-prosecution tort “remedies detention accompanied not by absence of legal process, but by wrongful institution of legal process.” *Wallace v. Kato*, 549 U.S. 384, 390, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007) (internal quotation marks omitted).
...

To succeed on a malicious-prosecution claim under § 1983 when the claim is premised on a violation of the Fourth Amendment, a plaintiff must prove the following: First, the plaintiff must show that a criminal prosecution was initiated against the plaintiff and that the defendant “ma[d]e, influence[d], or participate[d] in the decision to prosecute.” *Fox v. DeSoto*, 489 F.3d 227, 237 (6th Cir. 2007); *see also McKinley v. City of Mansfield*, 404 F.3d 418, 444 (6th Cir. 2005); *Darrah v. City of Oak Park*, 255 F.3d 301, 312 (6th Cir. 2001); *Skousen v. Brighton High Sch.*, 305 F.3d 520, 529 (6th Cir. 2002). Second, because a § 1983 claim is premised on the violation of a constitutional right, the plaintiff must show that there was a lack of probable cause for the criminal prosecution, *Fox*, 489 F.3d at 237; *Voyticky*, 412 F.3d at 675. Third, the plaintiff must show that, “as a consequence of a legal proceeding,” the plaintiff suffered a “deprivation of liberty,” as understood in our Fourth Amendment jurisprudence, apart from the initial seizure. *Johnson v. Knorr*, 477 F.3d 75, 81 (3d Cir. 2007); *see Gregory v. City of Louisville*, 444 F.3d 725, 748-50 (6th Cir. 2006) (discussing the scope of “Fourth Amendment protections . . . beyond an initial seizure,” including “continued detention without probable cause”); *cf. Heck v. Humphrey*, 512 U.S. 477, 484, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) (“[U]nlike the related cause of action for false arrest or imprisonment, [an action for malicious prosecution] permits damages for confinement imposed pursuant to legal process.”). Fourth, the criminal proceeding must have been resolved in the plaintiff’s favor. *Heck*, 512 U.S. at 484, 114 S. Ct. 2364 (“One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused.”).

Sykes v. Anderson, 625 F. 3d 294, 308-09 (6th Cir. 2010) (additional citations and footnote omitted); *see also Marcilis v. Twp. of Redford*, 693 F.3d 589, 604 (6th Cir. 2012) (“In order to prove malicious prosecution under federal law, a plaintiff must show, at a minimum, that there is no probable cause to justify an arrest or a prosecution.” (internal quotation marks and citation omitted)).

For the reasons previously stated, the complaint does not adequately allege that there was no probable cause to justify an arrest or prosecution. The complaint also does not allege that Defendants were involved in the decision to prosecute Plaintiff. Finally, the favorable termination requirement has not been satisfied.

The Sixth Circuit has held that a district court may allow a prisoner to amend his complaint to avoid a *sua sponte* dismissal under the PLRA. *LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013); *see also Brown v. Rhode Island*, 511 F. App’x 4, 5 (1st Cir. Feb. 22, 2013) (per curiam) (“Ordinarily, before dismissal for failure to state a claim is ordered, some form of notice and an opportunity to cure the deficiencies in the complaint must be afforded.”). Leave to amend is not required where a deficiency cannot be cured. *Brown*, 511 F. App’x at 5; *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 37 (1st Cir. 2001) (“This does not mean, of course, that every *sua sponte* dismissal entered without prior notice to the plaintiff automatically must be reversed. If it is crystal clear that the plaintiff cannot prevail and that amending the complaint would be futile, then a *sua sponte* dismissal may stand.”); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 114 (3d Cir. 2002) (“*in forma pauperis* plaintiffs who file complaints subject to dismissal under Rule 12(b)(6) should receive leave

to amend unless amendment would be inequitable or futile”); *Curley v. Perry*, 246 F.3d 1278, 1284 (10th Cir. 2001) (“We agree with the majority view that sua sponte dismissal of a meritless complaint that cannot be salvaged by amendment comports with due process and does not infringe the right of access to the courts.”). The factual allegations in Plaintiff’s complaint are insufficient to persuade the Court that leave to amend should be granted.

Therefore, the Court DISMISSES Plaintiff’s complaint for failure to state a claim on which relief may be granted, pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1). This dismissal is without prejudice to Plaintiff’s right to file a new lawsuit asserting a claim of malicious prosecution when, and if, the pending criminal case is resolved in his favor.

Pursuant to 28 U.S.C. § 1915(a)(3), the Court must also consider whether an appeal by Plaintiff in this case would be taken in good faith. The good faith standard is an objective one. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). The test for whether an appeal is taken in good faith is whether the litigant seeks appellate review of any issue that is not frivolous. *Id.* It would be inconsistent for a district court to determine that a complaint should be dismissed prior to service on the Defendants, but has sufficient merit to support an appeal *in forma pauperis*. See *Williams v. Kullman*, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983). The same considerations that lead the Court to dismiss this case for failure to state a claim also compel the conclusion that an appeal would not be taken in good faith.

Therefore, it is CERTIFIED, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal in this matter by Plaintiff would not be taken in good faith.

The Court must also address the assessment of the \$505 appellate filing fee if Plaintiff nevertheless appeals the dismissal of this case. A certification that an appeal is not taken in good faith does not affect an indigent prisoner plaintiff's ability to take advantage of the installment procedures contained in § 1915(b). *See McGore v. Wrigglesworth*, 114 F.3d 601, 610-11 (6th Cir. 1997), *partially overruled on other grounds by LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013). *McGore* sets out specific procedures for implementing the PLRA, 28 U.S.C. § 1915(a)-(b). Therefore, the Plaintiff is instructed that if he wishes to take advantage of the installment procedures for paying the appellate filing fee, he must comply with the procedures set out in *McGore* and § 1915(a)(2) by filing an updated *in forma pauperis* affidavit and a current, certified copy of his inmate trust account for the six months immediately preceding the filing of the notice of appeal.

For analysis under 28 U.S.C. § 1915(g) of future filings, if any, by Plaintiff, this is the first dismissal of one of his cases as frivolous or for failure to state a claim. This “strike” shall take effect when judgment is entered. *Coleman v. Tollefson*, 733 F.3d 175, 177-78 (6th Cir. 2013), *cert. granted*, 82 U.S.L.W. 3675 (U.S. Oct. 2, 2014) (Nos. 13-1333, 13A985).

The Clerk is directed to prepare a judgment.

IT IS SO ORDERED.

s/ **James D. Todd**
JAMES D. TODD
UNITED STATES DISTRICT JUDGE